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## STATUTE

Revenue Act of 1926, section 303 (a), as amended 15

# Supreme Court of the United States

OCTOBER TERM, 1945.

INDUSTRIAL TRUST COMPANY ET AL.
EXECUTORS,
*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

*To the Honorable Justices of the Supreme Court of the United States:*

The petitioners, Industrial Trust Company, Milton Sulzberger, and Katherine M. Hahn, executors of the will of J. Jerome Hahn, late of Providence, Rhode Island, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered October 29, 1945 in the case between the above-named parties, docketed therein as No. 4038. Said judgment affirmed a decision of the Tax Court of the United States dealing with the deduction of gifts to charity in computing estate taxes under the Internal Revenue Code.

## Opinions Below.

The memorandum opinion of the Tax Court is printed in the Record, pp. 44-46. The opinion of the Circuit Court of Appeals is reported in 151 F. 2d 592, and is printed in the Record, pp. 59-65.

## Jurisdiction.

This Court has jurisdiction to review said judgment under U. S. Code, Title 28, Sec. 347.

This application is made within three months after the entry of such judgment, as required by Sec. 350.

## Question Presented.

In computing the Federal estate tax are the valuation and deduction from the gross estate of a charitable bequest of a remainder interest under a testamentary trust precluded, regardless of the degree of the improbability that the *corpus* will be invaded, solely because the will confers upon the trustees the following power to invade *corpus*:

> "I authorize and direct my Trustees, if at any time, during the lifetime of my wife, in their sole and uncontrolled opinion and discretion, to be exercised by the Trustees other than my wife, the fixed income payable to my wife under this my will, shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure, to pay over to her, in addition to said fixed income for her personal use and benefit such and so much, from time to time, of the net income of my trust estate, or if that should be insufficient then such and so much of the principal of my trust estate, as said Trustees may deem to be required for any purpose approved by them, and all such income or principal paid over to my wife under the powers of this paragraph shall

be freed and discharged of all trusts. I direct that said powers and discretions shall be liberally construed for the personal benefit of my wife for the assurance of her comfortable maintenance and support. I also give a like power and discretion to my Trustee to make additional payments out of income or principal, or both, to my mother and sister, and for like purposes, and with like effect."

## Statute Involved.

The statute involved is the Revenue Act of 1926, Sec. 303, as amended by the Revenue Act of 1934, Sec. 402 (a) and as enacted into the Internal Revenue Code, Sec. 812 as in force December 6, 1938. The relevant part of the statute is set out in the appendix (*infra*, p. 15).

## Statement.

The facts are undisputed. The decedent, J. Jerome Hahn, died December 6, 1938, testate. The gross estate was valued at $1,873,436.05. (R. 26, 27.)

The will contained various direct pecuniary legacies amounting to $26,500. Claims and expenses equalled $126,500, and the admitted estate tax was $54,700. Disregarding the tax in dispute, the residuary estate was thus approximately $1,680,000. (R. 11, 13-14.)

This residuary estate was given to trustees to pay from the income $12,000 per year to the decedent's widow, Katherine M. Hahn; $6,000 per year to the decedent's mother, Rose Hahn; and $6,000 per year to the decedent's sister, Beulah May Nordlinger. The trustees were also directed to maintain the residence of the decedent and his widow during its occupancy by her and to maintain for her their summer home. Excess income was to be accumulated and disposed

of with the *corpus* upon termination of the trust. (R. 14, 15, 17.)

Upon the decease of the *widow,* payments of small specific amounts aggregating $21,000 were to be made to nine charitable institutions. Upon the death of the widow and either the death of all other "annuitants" or provision being made for them by purchase of annuities, the sum of $150,000 was to be paid to the Miriam Hospital and 7/8 of the balance of the trust *corpus* to the Rhode Island Hospital. The remaining 1/8 of *corpus* or $40,000, whichever was less was given to certain relatives of the decedent. (Ex. B, R. 14-17.)

The will contained provisions quoted in the question on p. 2 authorizing the trustees to use the excess net income, or *corpus* if necessary, for any expense deemed by the trustees, other than the widow, to be proper for the comfort and pleasure of the life tenants.

Judge Hahn, the decedent, was born in Albany, New York, on August 20, 1868. He was admitted to the Bar of the State of Rhode Island on July 18, 1891 and engaged in the practice of his profession in that State until March 27, 1919, when he became an associate justice of the Superior Court. On March 16, 1931 he became an associate justice of the Supreme Court of the State of Rhode Island, in which capacity he served until his retirement on January 1, 1935. (R. 28.)

Katherine M. Hahn, the widow, employed one maid in the home with a helper at irregular intervals. She had purchased one automobile since the decedent's death, which was at the time of the hearing nearly four years old, and she had been accustomed to make one annual trip to Florida. (R. 28.)

In accordance with the provisions of the will the trustees have paid to Mrs. Hahn the sum of $12,000 each year and have, in the exercise of their discretion, paid to her additional

sums from income. During the four full years succeeding the death of the testator the trustees paid to her in the aggregate, including her annuity of $12,000, the following sums:

| | | | |
|---|---|---|---|
| 1939 | — | $21,594.91 | |
| 1940 | — | 21,836.81 | |
| 1941 | — | 24,054.38 | |
| 1942 | — | 26,116.72 | (R. 31 – Ex. 1.) |

Rose Hahn, the mother of the decedent, being 90 years old, was an inactive person, and the trustees made no payments to her in addition to the sum of $6,000 per year as required by the will, until her death on November 27, 1941. (R. 28-29, 31. Ex. 1).

Beulah May Nordlinger, the sister of the decedent, had substantial income of her own which averaged from $15,000 to $20,000 per year between 1939 and the time of her death on June 23, 1943. She was never paid any sums by the trustees in addition to the fixed amount of $6,000 per year required by the will. (R. 29, 31 – Ex. 1.)

The will also provided two small annuities of $1,000 and $500 respectively, which are not of importance on the questions presented.

The estate, being substantial, produced a large income, and during the four full years prior to the Tax Court hearing the income for each year was as follows:

| | | |
|---|---|---|
| 1939 | — | $93,153.38 |
| 1940 | — | 107,225.70 |
| 1941 | — | 105,445.78 |
| 1942 | — | 100,436.97 |

Total disbursements, including all expenses of the trustees as well as payments to beneficiaries were as follows:

| | | |
|---|---|---|
| 1939 | — | $56,695.19 |
| 1940 | — | 69,848.15 |
| 1941 | — | 78,719.26 |
| 1942 | — | 69,802.22 |

Thus there were the following annual accumulations:

| | | |
|---|---|---|
| 1939 | — | $36,458.19 |
| 1940 | — | 37,377.55 |
| 1941 | — | 26,726.52 |
| 1942 | — | 30,634.75 |

Total accumulated income at the end of 1942 was $131,197.01. (R. 31-32. Exhibits 1 and 2.)

The petitioners have computed the present values of the various charitable gifts as follows:

| | | |
|---|---|---|
| (a) | The Congregation Sons of Israel and David, Providence, R. I. | $3,360.60 |
| (b) | The Jewish Orphanage, Providence, R. I. | 1,344.24 |
| (c) | The Jewish Home for the Aged, Providence, R. I. | 1,344.24 |
| (d) | St. Joseph's Hospital, Providence, R. I. | 1,344.24 |
| (e) | The Providence Lying-In Hospital, Providence, R. I. | 1,344.24 |
| (f) | The Homeopathic Hospital, Providence, R. I. | 1,344.24 |
| (g) | Butler Hospital, Providence, R. I. | 1,344.24 |
| (h) | Boston University, Boston, Mass. | 1,344.24 |
| (i) | Providence Community Fund, Inc., Providence, R. I. | 1,344.24 |
| (j) | Miriam Hospital, Providence, R. I. | 79,135.50 |
| (k) | Rhode Island Hospital, Providence, R. I. | 1,233,045.55 |

(R. 29.)

It is admitted by the Commissioner that the beneficiaries named in the preceding paragraph are charitable beneficiaries within the meaning of Section 812 (d) of the Internal Revenue Code and that the values of the gifts stated in items (a) to (i) inclusive are computed in accordance with the applicable regulations. The values of items (j) and (k) are accepted for argument with the reservation by the Commissioner that the computation be reviewed as to its actuarial exactness if the deduction is otherwise allowable. (R. 29-30, 42.)

On the basis of these computations the petitioners, in the estate tax return, claimed a deduction in the sum of $1,326,274.57 in computing the estate tax.

The Commissioner, because of the discretionary power of the trustees to use income and principal, disallowed all the above items as deductions and assessed a deficiency in tax of $382,188.88.

The Tax Court upheld the action of the Commissioner on the authority of *Merchants National Bank* v. *Commissioner,* 320 U. S. 256. No findings of fact were made as the Court held the question to be one of law. (R. 44-46).

The Circuit Court of Appeals for the First Circuit affirmed the decision of the Tax Court, also relying on *Merchants National Bank* v. *Commissioner.*

**Specification of Errors**

1. The Court erred in applying the ruling of the Supreme Court in *Merchants National Bank* v. *Commissioner,* supra, as a rule of law to be applied regardless of the factual degree of probability of depletion of *corpus.*

2. The Court erred in affirming the decision of the Tax Court as a conclusion of law without findings of fact as to the probability of payment of the charitable bequests.

3. The Court erred in failing to follow the composite rule established by this Court in the cases of *Ithaca Trust Company* v. *United States*, 279 U. S. 151, and *Merchants National Bank* v. *Commissioner*, supra.

4. The Court erred in ruling that as a matter of law, based solely upon the terms of the will and regardless of other facts differing substantially from those in the *Merchants National Bank* case, the values of the various charitable bequests could not be determined at the death of the decedent.

5. The Court erred in ruling that as a matter of law, based solely upon the terms of the will and regardless of other facts differing substantially from those in the *Merchants National Bank* case, the values of the charitable bequests of specific amounts could not be determined at the death of the decedent.

**Reasons for Granting the Writ.**

The decision of the First Circuit Court in this case is in conflict with decisions of other Circuit Courts rendered since the decision of this Court in the *Merchants National Bank* case.[1] The Circuit Court of Appeals in its decision misconstrues the opinion in the *Merchants Bank* case in applying it beyond its true scope and thus repudiates the rule established by the *Ithaca Trust* case. The First Circuit Court is attempting to carry out the strict rule previously announced by it which is at variance with the basic conceptions of other Circuit Courts,[2] and which is believed not to follow the theory adhered to by this Court.

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[1] *Commr.* v. *Robertson*, CCA 4, 141 F. 2d 855.
*Commr.* v. *Wells Fargo*, CCA 9, 145 F. 2d 130.
Both cases, although decided after the *Merchants National Bank* case affirmed decisions of the Tax Court entered prior to the *Merchants National Bank* opinion.

[2] Cf. opinions of First Circuit Court in *Merchants National Bank* v. *Commr.*, 132 F. 2d 483, and this case with opinions of Ninth Circuit Court in *Commr.* v. *Bank of America*, 133 F. 2d 753, and *Commr.* v. *Wells Fargo*, 145 F. 2d 130, and with opinion of Fourth Circuit Court in *Commr.* v. *Robertson*, 141 F. 2d 855.

The question presented is of great importance in the administration of the estate tax law and it is submitted that some clarification of the precise limits of the theories of the *Ithaca Trust Company* and *Merchants Bank* cases is needed.*

Respectfully submitted,

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*The Board of Tax Appeals and the Tax Court consistently *allowed* deductions in similar cases subsequent to the *Ithaca Trust Company* case and prior to the *Merchants National Bank* case.

*Sanderson* v. *Commr.*, 18 BTA 221.
*Boston Safe Deposit* v. *Commr.*, 21 BTA 394.
*Michigan Trust Co.* v. *Commr.*, 27 BTA 556.
*Hallett* v. *Commr.*, 29 BTA 494.
*Caughey* v. *Commr.*, 44 BTA 385.
*Field* v. *Commr.*, 45 BTA 270. (*Merchants* case.)

The Tax Court has *denied* deductions in all but one case since the *Merchants National Bank* case.

*Schumacker* v. *Commr.*, TC. Memo, Docket No. 109988.
*DeCastro* v. *Commr.*, TC. Memo, Docket No. 5071.
*Wiggin* v. *Commr.*, 3 TC. 464.
*John W. Holmes*, 5 TC., No. 156.
*Nathan P. Cutler, Jr.*, 5 TC., No. 159.

*Allowed in Wetherell* v. *Commr.*, 4 TC. 678. (Petition for review dismissed on motion of Commissioner.)